

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 18

HAROLD F. SNYDER, PETITIONER,

vs.

CITY OF MILWAUKEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN

PETITION FOR CERTIORARI FILED MARCH 15, 1939.

CERTIORARI GRANTED APRIL 17, 1939.

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[fol. 1]

**IN SUPREME COURT OF WISCONSIN, AUGUST
TERM, 1938**

No. 158

CITY OF MILWAUKEE, Plaintiff and Respondent,

vs.

HAROLD F. SNYDER, Defendant and Appellant

Case—Filed August 19, 1938**STATEMENT ON APPEAL**

This is an appeal from a judgment of the Circuit Court of Milwaukee County, Hon. Charles L. Aarons, Judge presiding, finding the appellant guilty of a violation of a city ordinance of the City of Milwaukee, which prohibits the distribution of handbills and other printed matter on the public streets, and in public places in the City of Milwaukee.

[fol. 2] Docket entry District Court, Milwaukee County.

Affidavit of prejudice of City of Milwaukee.

Notice of appeal by City of Milwaukee.

Affidavit for appeal to Municipal Court.

Notice of City of Milwaukee of appeal to Municipal Court.

Clerk's certificate.

Docket entries Municipal Court, Milwaukee County.

Affidavit for change of venue.

Cover.

Certificate of clerk on change of venue.

IN CIRCUIT COURT OF MILWAUKEE COUNTY**MEMORANDUM DECISION**

Each of the defendants was charged with violation of Sec. 865 of the Milwaukee Code. (A copy of this section is attached to this Memorandum.) The District Court of Milwaukee County dismissed all of the cases, apparently on the ground that the ordinance (Sec. 865) is unconstitutional in so far as it attempts to make unlawful the distribution of

handbills. The City of Milwaukee has taken these appeals from such determination.

By stipulation the filing of formal complaints was waived. A trial de novo of the Snyder case was had in this court. Each of the other cases was submitted upon stipulation that the facts in each were substantially the same as in the [fol. 3] Snyder case, and that the decision of this court in the Snyder case should govern the decision in all the other cases.

The evidence is undisputed and is to the following effect: On April 27, 1938, the defendant (Snyder) stood at or near the Shinner Meat Market at 1306 W. Vliet street, and distributed handbills to pedestrians on the street. The contents of the handbills pertained to a labor dispute with the Shinner Meat Market, the defendant acting in the capacity of a picket. Many of the handbills were thrown into the street by the persons to whom they were thus distributed. As a result there were numerous handbills in the gutter, some in the safety zone and some were run over and were sticking to the rails of the street car track. The police officers did not arrest any of the pedestrians who had received the handbills from the defendant and who threw them away. This was in accordance with a policy of the police department to the effect that whenever the distribution of handbills results in the littering of the streets the one who is "the cause," that is, the one who passes out the handbills, is arrested.

It is contended by defendant's counsel that the portion of the ordinance which makes unlawful the circulation or distribution of handbills, etc. (i. e., the part in bold face type in the annexed copy), is an attempt to abridge the right of the defendants to freely publish their sentiments—a right guaranteed by Sec. 3 of Art. I of the Wisconsin Constitution; that it is likewise in violation of the defendants' rights [fol. 4] concerning freedom of speech and of the press protected by the first and fourteenth amendments of the U. S. Constitution. Defendants' counsel strongly rely upon the decision of the Supreme Court of the United States in *Lovell v. City of Griffin*, 82 L. Ed. (Adv. Op. No. 13, p. 660, decided Mar. 28, 1938.) The City Attorney relies upon the decision of the Wisconsin Supreme Court in *City of Milwaukee v. Kassen*, 203 Wis. 383 (decided in 1931).

1. The decisions in these two cases are not in conflict. They are based upon ordinances which differ widely in con-

tent, scope and purpose. The Griffin ordinance is an outright prohibition of every kind of "literature" regardless of form—whether leaflets or books. In every case the distribution is termed a "nuisance." The Milwaukee ordinance, as construed by the Wisconsin Supreme Court, is applicable only to matter printed in a certain form, such as handbills, cards, dodgers, etc., which are easily blown about on the streets. The Griffin ordinance deals in a "broad sweep" with the distribution of every kind of literature and contains no reference to the evil of throwing waste substances on the streets. The opinion of Chief Justice Hughes specifically points out that it is not limited to, "the misuse or littering of the streets." The Milwaukee ordinance appears in Sec. 865 under the heading "Throwing filth, rubbish or nauseous substances on streets," etc. That section is contained in Article 16, headed "Garbage, Rubbish, Nauseous Substances and Odors." Article 16 is in Ch. 17 of the Code entitled "Health." (As to consideration of headings [fol. 5] of sections in interpreting a statute see *Knowlton v. Moore*, 172 U. S. 41, 44 L. Ed. 969, 978.)

The terms of Sec. 865 (in the light of these headings) make it clear that the purpose is not to prohibit the distribution of handbills except under circumstances when such distribution would be likely to cause an accumulation of waste material in the streets. If that were not true there would be no reasonable explanation for the position (in the section) of the sentence pertaining to handbills, etc. (See *Corstvet v. Bank*, 220 Wis. 209, 220.) That such is the purpose of the Milwaukee ordinance has been expressly decided by the Wisconsin Supreme Court. *Milwaukee v. Kassen*, 203 Wis. 383, 384, 385, 388.

Perhaps more vital than any other distinction is the one that in the Griffin ordinance the determination as to whether literature was to be distributed was placed entirely in the hands of a censor—the city manager. No standard was set up under which his acts were governed. He might grant a permit in one case though the street be littered with advertising circulars, and deny it in another where literature of any kind (books, for example) was distributed. The Griffin ordinance, as stated by Chief Justice Hughes, "Strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." It was held "invalid on its face."

The Milwaukee ordinance, as construed by the Wisconsin Supreme Court, instead of delegating to a censor the authority to determine what may be distributed, lays down a standard by which the Court, in each case, must be guided. [fol. 6] The application of that standard does not operate to arbitrarily forbid the distribution of literature of any type or character of content. It forbids only the distribution of paper in the form of handbills, etc., in such quantities and under such conditions as are likely to cause an unsightly accumulation of waste paper and a littering of the streets. *Milwaukee v. Kassen*, 203 Wis. 383, 385, 388. Mr. Justice Wickhem there quotes with apparent approval from *In re Anderson* (Neb.), 96 N. W. 149: "It has no reference to or connection with freedom of speech or of the press; and its plain purpose is, not to interfere with the publication of sentiments and opinions of individuals, but to promote the cleanliness and safety of the municipality" (id. 386).

There cannot be any substantial doubt that the Milwaukee ordinance, with the construction given it by the Wisconsin Supreme Court, does not infringe upon the constitutional rights of free speech and free press. This appears to be conceded by defendants' counsel, for he says (in his brief of May 18, p. 2): "it is clear from the *Kassen* case that our Supreme Court would even prior to the decision of the U. S. Supreme Court have held the ordinance invalid if it had not been assumed and stipulated that the purpose was the legal one of preventing littering of the streets."

It is true that the Court (in the *Kassen* case) said that both parties had conceded that such was the purpose of the ordinance. Obviously that concession had to be made, for, as the Court points out (p. 384) such construction had been previously made by the Court in *Mittelman v. Nash Sales, Inc.*, 202 Wis. 577. That the Court (in the *Kassen* Case) did not rest its position on the concession of the parties plainly appears from the discussion in the opinion of Mr. Justice Wickhem (id. pp. 384-388).

It further appears that, notwithstanding concessions of validity, the Court expressly ruled in favor of the constitutionality of the ordinance, as interpreted (id. top of p. 386). Such ruling is generally accepted where the ordinance is manifestly intended to keep the streets clean (cf. 22 A. L. R. Note, p. 1484 et seq.)

2. If it be assumed, as defendants' counsel contends, that the case of *Lovell v. Griffin* (supra) is essentially in con-

flict with the construction of the ordinance and the ruling on its validity in *Milwaukee v. Kassen* (*supra*), what must be the ruling here?

The answer has been made repeatedly and consistently by the Supreme Court of the United States to the following effect:

"The general rule is that the construction (of a state statute) given by the highest state court is conclusive on the Supreme Court of the U. S. where the question involved is whether such statute is repugnant to the federal constitution; and when such interpretation renders it constitutional and valid legislation it will not be disregarded by the U. S. Supreme Court, and a different construction given to the statute which will make it repugnant to the federal constitution" (6 *Ruling Case Law*, 86 [Const. Law, Sec. 85]).

[*fol. 8*] To the same effect: *Marine Nat. Exch. Bank v. Kalt-Zimmers Mfg. Co.*, 293 U. S. 361, 79 L. Ed. 427, 432; *Bandini Petroleum Co. v. Superior Ct.*, 284 U. S. 8, 78 A. L. R. 826, 833; *Wolff Packing Co. v. Court of Ind. Rel.*, 262 U. S. 522, 27 A. L. R. 1280, 1290; *Pierce Oil Corp. v. Hopkins*, 264 U. S. 137, 68 L. Ed 593, 596; *C. M. & St. P. R. Co. v. Risty*, 276 U. S. 567, 72 L. Ed. 703, 707; 27 R. C. L. 44-46 ("U. S. Courts," Sec. 50) citing many cases.

These cases amply demonstrate that in the case of the particular ordinance before the Court, the Supreme Court of the United States is, in any event, bound to follow the construction given to it by the Supreme Court of Wisconsin.

3. The Wisconsin Supreme Court has decided that this ordinance applies generally to the distribution of all printed matter in the form (regardless of contents) of circulars, handbills, etc.—which, "when circulated and distributed upon the streets constitute a well-recognized source of public annoyance by the littering of the streets." (203 Wis., p. 385.) Under that decision the fact that the contents of the circular pertains to political or economic questions, or to labor disputes, is immaterial. It is the form of the leaflet and the facility with which its distribution on the highway usually results in the cluttering up of waste material on the streets, which is prohibited, not the contents. Hence the contention that Sec. 103.53 (e) (in the Wis. Labor Code) creates an exception cannot be sus-

tained in the light of the Court's comments in the Kassen Case (p. 385).

[fol. 9] 4. The further contention is made by defendants' counsel that the proof shows that the ordinance in question is being enforced in an unreasonable and discriminatory manner. In that connection reference is made to the closing statements of the Court in its opinion in the Kassen Case (pp. 388-389), wherein the Court points out that a different question would be presented if the enforcement of the ordinance were shown to be directed at a class of persons for the purpose of suppressing the full expression of their views. Citing the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220.

The only evidence upon which this contention is based is the testimony of the police officer and the deputy inspector of police to the effect that in cases where circulars or handbills are littering the streets, the policy of the police department is to arrest the one who is "the cause"—the distributor—rather than the passerby who, after being handed one of these leaflets, tosses it into the street. The testimony is clear that no one is arrested for distributing except in cases where the papers distributed are observed to be littering the streets.

This evidence does not show that the enforcement of this ordinance is being directed "at a class of persons for the purpose of suppressing the full expression of their views rather than for the purpose of preventing the littering of the public streets" (quotation from Kassen Case *id.* p. 389); or that the ordinance is being enforced in an unreasonable manner.

[fol. 10] While it should not be implied that one who throws paper on the streets is not a violator of the ordinance, yet when one considers the difficulty of enforcing the ordinance in so far as it applies to the throwing of paper on the street by pedestrians, as compared to a method of enforcement which seeks to reach the source, it cannot well be said that there is anything so unreasonable and discriminatory in the enforcement as to meet the condemnation of the Court as stated in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 227. There an ordinance pertaining to the regulation of laundries was admittedly enforced only against the Chinese. The Court held that the unjust discrimination constituted a "denial

of equal justice" within the prohibition of the Constitution. In a later case the U. S. Supreme Court said on this subject: "No latitude of intention should be indulged. There should be certainty to every intent. * * * This is a matter of proof (that the law is discriminatory by the manner of its administration) and no fact should be omitted to make it out completely." *Ah Sin v. Wittman*, 198 U. S. 500, 49 L. Ed. 1142, 1146.

No claim is here made that there is any discrimination as to any known class or group of persons against whom the ordinance is enforced. The discrimination, if any, is against the greater offender, or the one who makes it possible for others to offend. The fact that persons receiving the circulars on the street—frequently taking them reluctantly—who throw them away, are not prosecuted because of the known difficulty of successful enforcement as [fol. 11] to an offense caused proximately by the distributor, can scarcely be deemed an analogous situation to that disclosed in the Chinese laundry case above cited.

For the reasons above stated the ordinance in question is a valid ordinance. The evidence as to the violations of the ordinance here involved being undisputed, the judgments (of the District Court) of dismissal in each of the cases and as to each of the defendants is reversed. The defendants and each of them are found guilty of a violation of the ordinance in the respect outlined above. The Court will hear counsel for both parties in respect to the penalty.

Chas. L. Aarons, Circuit Judge.

Dated May 24, 1938.

(From Article 16 of Ch. XVII ["Health"] of the Milwaukee Code)

Article 16 is headed: "Garbage, Rubbish, Nauseous Substances and Odors."

Sec. 865 is headed: "Throwing filth, rubbish or nauseous substances on streets," etc., and reads as follows:

"It is hereby made unlawful for any person, firm, or corporation, or for any officer, member, agent, servant or employe of any firm or corporation to place, throw or leave any slops, dirty water, or other liquid of offensive smell, or other nauseous or unwholesome, or any dead carcass, [fol. 12] carrion, meat, fish, entrails, manure or other nauseous or unwholesome matter or substance, or any

rubbish, ashes, paper, dirt, stones, bricks, manure, tin cans, boxes, barrels, or other substances whatsoever, or to circulate or distribute any circular, handbills, cards, posters, dodgers or other printed or advertising matter, or to drain or pour or to permit to drain or flow oil, kerosene, benzine, or other similar oil or oily substance or liquid, in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground, within the city of Milwaukee. Provided, however, that this section shall not apply to any garbage, manure, ash boxes or receptacles, which are built and maintained not less than twelve inches above the grade of the alley, nor more than three feet from the line of any lot or parcel of land abutting upon any alley in said city. Said boxes so built and maintained shall be waterproof, and shall at all times be kept securely covered except when depositing or removing the contents therefrom."

IN CIRCUIT COURT OF MILWAUKEE COUNTY

JUDGMENT

It is adjudged, that the defendant be and he is hereby found guilty of the violation of the ordinance in question and a fine of \$1.00 and costs is hereby imposed and in default of the payment of said fine he shall be imprisoned in the House of Correction of Milwaukee County, Wisconsin, for a period of thirty (30) days. Ten-day stay granted. [fol. 13] Dated at Milwaukee, Wisconsin, this 24th day of May, A. D. 1938.

By the Court.

Chas. L. Aarons, Circuit Judge.

Cover, bill of exceptions.

Stipulation on bill of exceptions.

Index of witnesses.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

Bill of Exceptions

JOHN KUCZKOWSKI, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination:

I am a member of the Milwaukee Police Department, and was a Milwaukee police officer on the 27th day of April of

this year. I was on duty on that day, and had occasion to observe the activities of the defendant. That was at about 12:10 on the 27th of April, 1938. We were cruising in the regular patrol car, going west on Vliet street. We observed two pickets in front of the Shinner's Meat Market, which is located in the City and County of Milwaukee at 1306 West Vliet street. We observed these two pickets in front of the meat market there. One was distributing handbills. We drove a little ways and we went to the curb and were watching them. We noticed a lot of people in the street; and the [fol. 14] pickets noticed us there, and they kept on distributing the bills. We were there about 20 minutes, and finally got out of the car. We picked up four of these pamphlets which were lying in the street, across the street, between the safety zone and the sidewalk. The market is located on the north side of Vliet street, and the pickets were marching in front of the store. This defendant, Harold Snyder, was one of the pickets, and he was the only one who was distributing these handbills there. These handbills were lying across the street, right in front of the J. C. Penney store, 1301 West Vliet street, and these four handbills are the ones I picked up.

The Court: I don't suppose the content of the handbills makes any difference either.

Mr. Zeidler: No, it does not make any difference what the handbills attempt to say.

Mr. Richter: It makes some difference here:

Mr. Zeidler: We don't care what they say.

The Court: I will receive them. If there has not been a sufficient connection between the defendant Snyder and the distribution or throwing around of these handbills, that may be testified to later, but they may be marked as "Exhibits 1, 2, 3 and 4."

The Witness: I was stationed in the squad car observing the movements of this particular picket, Harold Snyder, for about 20 minutes. As we observed them, the pedestrians were going by, and he would hold them right out and hand them to them. We noticed one or two that did go by there and asked for them, but most of them he would hand to them. [fol. 15] The Court: Who do you mean by "he"?

The Witness: We then left this one spot, on the north side of Vliet street, and went over to the corner and parked on the opposite side, that is, the south side of Vliet street, and

we got a better view of it. We noticed these people as they got the handbills; some of them would cross the street, wait for the street car, and they would throw them down in the street.

The handbills which had been given to them by this defendant, they would throw them into the street, and we waited there I would say for about twenty minutes, and then we went over and picked up four of those handbills while Mr. Snyder was watching us pick them up.

The Court: Are those the four?

A. Yes.

Those were the four I observed people dropped to the pavement, they were the ones lying thereon. Whether they were the ones or not—there was a lot more there, but I picked those four. The area over which these handbills were lying on the pavement, was about a quarter of a block, covered the intersection of North Thirteenth street, up to about 100 feet west of Thirteenth street. There were probably about thirty or forty handbills picked up, something like that. All we have picked up are those four.

The Court (Q.): There were thirty or forty there, but you picked up only four?

A. Yes, that is all. We could have picked up thirty or forty.

This other police officer with me was Patrolman Henry [fol. 16] Retzer; we were both in uniform. The reason Mr. Snyder and the rest of these people marching in front of the meat market, I imagine there is some trouble of some kind there, some labor dispute of some kind. That is probably the reason they were picketing there. I imagine the pamphlets were being distributed to state the cause of the pickets. There were two pickets thereof. The automobile traffic conditions on Vliet street at the time and place in question, was not very heavy. On Vliet street there is a street car line going in an easterly and also in a westerly direction—street car rails on the street. There is asphalt pavement on Vliet street at that point in question, and it was dry. There was a wind at the time.

We really noticed that on account it happened to be a windy day, the paper was flying around in that vicinity at the time. I did not get any handbills from this defendant, Harold Snyder. He did not make any statement to me with reference to the number of handbills he distributed at that time.

The extent of the pedestrian traffic in front of this meat market was not very heavy, but noon hour there is usually quite a crowd of people go by there. It didn't happen to be, that is, not very, what we will call crowded, so far as pedestrian traffic is concerned. During the period I observed the activities of Harold Snyder, he handed out about 75 to 100 handbills. He had handbills in his hand when I arrested him. I did not ascertain the amount of handbills he had. After I made the arrest and we had him in the squad [fol. 17] car, taking him down to the station, he said he didn't know he was violating the law; they didn't tell him anything about it.

Cross-examination:

We were notified about five minutes to twelve that there are pickets at the Shinner's Meat Market, and we were told to kind of look around when we go by, by Captain Polcyn. We were ordered to observe the condition, and if we saw a violation we were to arrest them.

Q. And that has been the general order, to arrest persons distributing handbills or pamphlets on the street?

A. If there was a violation—

Q. Now, Mr. Officer, just answer the question, simply, and don't give us any law.

Mr. Zeidler: Let him answer the question.

Mr. Richter: Let me ask a question.

Mr. Zeidler: You have asked it. I object to the question on the ground that it is incompetent, irrelevant and immaterial, as to what the orders were.

The Court: Objection sustained, gentlemen. It doesn't make any difference.

I did not arrest anybody that threw any of the handbills on the street. I saw numbers of people drop them down in the street. There is a standing instruction and order from our superior officers not to arrest people who throw these handbills on the street.

The Court: He asked whether you got such instructions. [fol. 18] Mr. Zeidler: I am objecting to that question on the same ground.

The Court: You may answer.

Mr. Zeidler (Q.): Do you understand the question, officer?

A. Not very clearly.

Mr. Richter (Q.): Let me see if I can make it more clear. You are instructed and have been as long as you have been a police officer, that under this ordinance you are to arrest only people who distribute or circulate handbills and not people who throw any on the street, isn't that correct?

A. We have been instructed as to this ordinance—as I said, we were sent down here, and if we noticed any violation we were to arrest.

Q. What is a violation under your instruction under this ordinance?

A. The violation in this respect was that this fellow was passing out handbills, and we observed him for about 20 minutes, and noticed people throw them down, and as the streets were littered with the pamphlets we went up and picked up—

Q. Who instructed you that it was a violation to pass them out and not a violation to throw them down?

Mr. Zeidler: I am renewing my objection on the same ground.

The Court: I will sustain that objection. This is going beyond the necessities. I allowed it to go some distance, contrary to my original ruling. I am still of the opinion that the instruction received by him should not be considered by the Court. While I am not passing on it finally at this [fol. 19] moment, I am of the opinion now that whatever instructions he may have received, as testified here, are of no importance; they don't count for anything. The question is whether or not there was a violation of this ordinance, and just what was done by way of violating it, not by way of arresting the violator.

Mr. Richter: I am getting at entirely general orders of the police department. I don't want to argue it any further. We spent a lot of time on it now.

Mr. Zeidler: I make a motion to strike any such testimony relating to general orders, such as were referred to by counsel in his questions.

The Court: That is rather broad. The authority of this man to arrest is probably not necessary. He is a police officer, and without any instruction, if he observes a violation of an ordinance, he has a duty to arrest. You don't need him to testify that somebody told him to look out for violations. I think I will grant the motion to strike out anything pertaining to orders that he received.

We were up there more than one day in that locality, we travel through that vicinity, that is our district, in a patrol car.

Q. And you saw those pickets there day after day?

A. Not at that time; that was the first day they were there.

We knew about the pickets, that is all. We, ordinarily, in patrol cars, squad cars, don't get—that pertains mostly to the man on the beat. We did happen to go by there at [fol. 20] that time and the captain had called our attention to it. Patrolman Henry Retzer was the man with me in the squad car. One man marching there in the picket line carried a banner, and had an armful of bills.

HENRY RETZER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination:

I am a member of the Milwaukee Police Department, and was such police officer on the 27th day of April, 1938, and was engaged in police duties and observing what happened in front of the premises known as 1306 West Vliet street, Milwaukee, Wisconsin. 1306 West Vliet street is a meat market operated by Shinner Brothers. I viewed the premises about 12 o'clock noon, on Wednesday, April 27th, in a squad car, accompanied by Patrolman Kuczkowski. I observed the activities of the defendant, Harold Snyder, at that time. As he was walking back and forth in the picket line he passed out handbills to numerous people passing by, going east and west along the walk. He had an armful of these handbills in one arm, and some people reached out their hand to accept one of these bills, others were just walking by and he would pass out the bill, hold it in front of them for them to take it, and some of the people gave a quick glance at the bill, and dropped them on the sidewalk or in the gutter; others walked several feet and then crunched them in the hand and threw them on the walk. [fol. 21] Some of the handbills were lying on the walk on the north side of Vliet street. Some of them were lying in the gutter on the north side of Vliet street, and they were

all in front of those premises known as 1308 West Vliet, all those that were picked up by Patrolman John Kuczkowski. I do not know whether these are the ones that were picked up by Patrolman John Kuczkowski, but they were handbills similar to those that were being distributed and lying around on the street and sidewalk in that vicinity. Those were handbills which had been handed out to various pedestrians by the defendant and which were dropped by these pedestrians. There were numerous handbills of the same type lying on the south side of Vliet street, in the gutter. Some of them I observed—some of those on the car track were run over by the wheels, the eastbound. Of course they were kind of sticking to the track; some of them were lying up against the safety zone, the safety zone on the south side of the street, the rest—. This elevated safety zone is located on the southwest corner of Thirteenth and Vliet, for eastbound street car passengers. Well, as I said before, I saw two of them that were sticking to the street car rails, eastbound street car track, and three or four of them lying up against the safety island. There were dozens of them lying up against the gutter on the south side of Vliet street, just west of Thirteenth street; and I saw two of these same handbills lying on Thirteenth street, just south of Vliet. I observed the movements of this defendant for about fifteen or twenty minutes. While we were there, he was the only person distributing handbills at this [fol. 22] point. After we observed the movements of this defendant for fifteen or twenty minutes, my partner and I arrested him.

Cross-examination:

I saw three or four people drop them. Some walked across to the safety island and took the street car, and threw them down before they got on the street car. None of those that I saw dropped handbills while on the north side of Vliet street; they dropped them as they were walking on the side walk or into some other store. I did not see anybody walk across to the street car with the handbill, and I do not know how those got over there near the safety island. I did not arrest anybody there that day for dropping handbills, and I did not see Mr. Snyder drop any handbills. I saw him offer them to people, and if they didn't take them, he kept them in his hand.

Redirect examination:

This particular premises, Shinner's market, is located west of Thirteenth street on the north side of the street, and Vliet street is a street which has a number of business places on both side of the street, such as grocery stores and meat markets, and there are department stores, clothing stores and shoe stores. The wind was blowing up there that day in a sort of an easterly direction.

[fol. 23]

Defendant's Case

EDWARD BARZYKOWSKI, having been duly sworn, testified as follows:

Direct examination:

I am secretary of The Amalgamated Meat Cutters & Butcher Workmen of North America, A. F. of L. There is a labor dispute there, and we were picketing Shinner's. That is one means we have of trying to bring our message across to the public, is the handbill.

Snyder was one of a number of pickets that were operating under the directions of the Union. Shinner's had five markets in Milwaukee.

Wednesday, May 18, 1938 (In Chambers)

RULING AS TO TESTIMONY

The Court: At the request of the Court, Assistant City Attorney Carl F. Zeidler, representing the plaintiff, and Attorney Arthur W. Richter, representing the defendant, are here present. The Court announced that upon giving further consideration to the matter the Court is of the opinion that the rulings made during the trial in respect to the method or manner of administration of the ordinance in question, by the city or by the police department, are not correct and should be modified. The Court called attention to the fact that upon motion of the City Attorney, the Court struck out testimony pertaining to orders or instructions given to the police officers who testified, by their superior

officers. The Court during the trial was of the opinion that [fol. 24] such testimony was immaterial, but is now of the opinion that testimony pertaining to the method of administration of the ordinance, which would tend to show discrimination in the enforcement of the ordinance, may be properly received. The Court now vacates its former ruling, striking out testimony on the subject referred to, and now rules that the motion to strike is denied and the testimony given may stand. In view of the remarks made by the Court, as to its position on the proposition referred to, the Court now directs that the case be reopened in order to permit counsel for the defendant to ask further questions by way of cross-examination or direct examination of witnesses produced by the defendant, or to introduce any further testimony pertaining to the subject of the method of administration of the ordinance by the City of Milwaukee or by the police department, or pertaining to any discrimination in the enforcement of such ordinance. Counsel for the defendant thereupon made arrangements to produce further testimony. Now, I think we will go into the court room. Does that substantially state it?

Mr. Richter: Yes, that is a complete statement.

Mr. Zeidler: Yes.

(Trial Resumed.)

The Court: The case is reopened upon the Court's own motion, this morning, and rulings made as shown in the reporter's notes. The case being reopened, counsel for defendants I understand wishes to call a witness, either adversely or otherwise. The deputy inspector of police, Mr. [fol. 25] Goehlen, is here at the request of Mr. Richter, and if you desire to have him testify, he may be called.

Mr. Richter: Yes, I do.

The Court: Called on behalf of the defendant.

HUGO GOEHLLEN, called as a witness on behalf of defendants, having been duly sworn, testified as follows:

Direct examination:

I am deputy inspector of police of the City of Milwaukee, and have been such since December, 1936. And prior to that I was captain of the traffic department, and prior to

that I was lieutenant of police. I have been on the police force eighteen years, since 1921. As deputy inspector, I have charge, under the chief, of the enforcement of the laws here, and general charge of the police officers of the city. We have issued orders to our police officers that where people are passing out handbills and these handbills litter the streets, they are to make arrests. We have not issued orders to arrest any persons who throw them on the street, but are arresting those that are passing them out. Yes, that has been enforced as long as I have been on the police department, and it has also been the order and policy of enforcement of the police department not to arrest distributors who put handbills or circulars on private property, that is, who go into the private property of persons and throw handbills there. We don't make arrests of those; but if they do pass them out on the street and they litter the streets, we then make arrests.

[fol. 26] I know that there is a city-wide distribution at all times of commercial circulars into the homes on private property. Those persons are not arrested because they are not distributing them on a public highway, street or alley, and are not littering the streets.

Q. I understand the reason. I just wanted this in the evidence. And your instructions are to arrest anyone who distributes any circulars or printed matter on the street if any of those circulars or handbills afterward get onto the street, isn't that right?

A. Where they litter the streets, yes, sir.

Q. And then you arrest the distributor, but not the person who throws it on the street?

A. We arrest the cause, the man who is passing them out, yes, sir.

Q. And that has been the policy and method of enforcement of this ordinance all along, is that right?

A. It has.

Cross-examination:

The only orders the police department issues, specifically the patrolmen, not to arrest persons who distribute commercial, economic or political literature or propaganda to the homes, is where the passing of these handbills litter the streets, they are to make arrests. In other words, where

the distribution takes place on the sidewalk, streets, alleys, or in public places.

The Court: I think he has made that pretty plain.

[fol. 27] Mr. Zeidler: I just wanted to make sure that that picture has been properly presented. That is all.

Mr. Richter (Q.): On the day that these arrests were made, Inspector, which you recall very well, I know, Captain Polcyn, as the testimony shows, ordered the squad car to go to the Shinner's market, where, as you knew, picketing was going on, and observe the distribution: was that by your orders?

A. Now, Mr. Richter, I couldn't tell you that, because I don't get all the complaints that go into the district stations. That was handled by the captain individually. But, I do know that the order was issued to all district commanders that where the passing of these handbills caused the littering of the streets, they were to make arrests. Now, on an individual call, by sending a squad car or by sending a patrolman, that I couldn't answer you.

Well, if the complaint is not serious, we would not use a squad car, but if somebody says there is a serious littering of streets there, yes, a squad car would be dispatched. It all depends on the nature of the complaint. Of course I was aware that that distribution was in connection with the picketing in the labor dispute there, no doubt about it.

Reporter's certificate.

Judge's certificate.

Notice of appeal.

Undertaking on appeal.

Clerk's certificate to record.

[fol. 28]

EXHIBITS 1 TO 4

To the Citizens of Milwaukee:

Since 1934 we have endeavored to organize the Shinner markets owned by E. G. Shinner Company of Delaware into union shops. The Shinner company fought us in all the courts and finally the Supreme Court of the United States decided that we had a bona fide labor dispute with the company, and had a right to picket their

places of business. Our demands are merely that they join with the vast majority of all other meat markets in the city and employ union help and comply with union conditions. It is the policy of the government of the United States, expressed in its laws, and it is the policy of the State of Wisconsin, also expressed in its laws, that employers deal with organized labor. The obstinate refusal to do so is opposition to the public policy and laws of your country and your state.

Organized labor has done its share towards helping this country out of the depression, and it wants to continue to do so. The opposition of employers like Shinner's hampers its efforts to aid the country. It is unpatriotic to work for an employer such as Shinner's is, and it is unpatriotic for you as citizens to purchase from such an employer. If you want to help the workingmen of the United States, and aid the regulation of industries towards a speedy recovery, you will not deal with Shinner's.

Do not be deceived by the claim of Shinner's that they [fol. 29] have a union in their shops. The union which they claim to have is a company union created by Shinner's, and not by its employees, and is of the type that is prohibited by the Wagner Labor Relations Law of Congress, and that has been repeatedly condemned by the courts of our country.

Shinner & Company have claimed throughout the lawsuits that they paid union wages and maintained union hours and complied with other union standards. They have just filed a so-called "contract" in the Federal Court, which shows that they pay lower wages than union butchers receive, that they work their men longer hours than unions permit, and that they do not conform to union standards. They have deceived the courts and the public on these questions.

Remember that every chain store in Milwaukee employs union butchers with the sole exception of Shinner Meat Markets.

We ask you, as good American citizens, to refrain from trading with Shinner's.

Amalgamated Meat Cutters and Butcher Workmen
of North America, Local No. 73, of the American
Federation of Labor.

[fol. 30]. IN SUPREME COURT OF WISCONSIN, AUGUST CALENDAR, 1938—JANUARY TERM, 1939

No. 158

CITY OF MILWAUKEE, Respondent,

vs.

HAROLD F. SNYDER, Appellant

OPINION—Filed January 10, 1939

Appeal from a judgment of the circuit court for Milwaukee County: Charles L. Aarons, Circuit Judge. Affirmed.

Action by city of Milwaukee against Harold F. Snyder charging violation of a city ordinance. From a judgment of conviction the defendant appeals.

Proceedings were commenced in the District Court of Milwaukee county charging the defendant with violation of a city ordinance declaring it "unlawful for any person . . . (among other things constituting various kinds of nuisances) to circulate or distribute any circular, handbills, cards, posters, dodgers or other printed or advertising matter . . . in or upon any sidewalk, street or alley . . . within the city of Milwaukee." (We will hereinafter use the word "handbill" as including the several kinds of printed matter here enumerated and all other kinds.)

The District Court on trial dismissed the action. The plaintiff appealed to the Municipal Court from the judgment of dismissal. On the filing of an affidavit charging prejudice against the judge of the Municipal Court, the action was transferred to the Circuit Court for trial. The case was tried to the court without a jury.

During the picketing of a chain of several stores operated by the Shinner Company in the city of Milwaukee in a labor dispute between the company and a local Butcher's Labor Union affiliated with the American Federation of Labor, the defendant and several other pickets, members [fol. 31] of the union, were arrested for violation of the city ordinance above referred to by distributing handbills on the city streets and taken before the District Court of Milwaukee County for trial. The handbill set forth

the contentions of the labor union respecting the matters in dispute and requested the public not to patronize the shops operated by the company. The picket would hand a pedestrian on the sidewalk in front of a store of the Shinner Company a handbill. The person receiving a bill would ordinarily throw it upon the sidewalk or the street adjacent. No violence was committed, no threats made, and no intimidation practiced by the distributing pickets. Pedestrians who dropped the bills were not arrested. The handbills were nine by twelve inches in size. The number of handbills on the street near where the defendant was distributing the bills was stated by one of the officers who arrested him to be "dozens," and by the other officer taking part to be "seventy-five to a hundred." It was a windy day, and some of the bills were blown about.

The settled policy of the police department pursuant to a general instruction of the chief of police respecting the distribution of handbills was not to arrest the person who dropped a handbill handed to him, but to arrest the man who handed it to him, if and when, and only if and when, the bills so handed were dropped on the streets in numbers sufficient to constitute a substantial littering of a street or streets. This course was followed in the instant case. Distribution of handbills on private property was not interfered with, because such distributions were considered as not within the terms of the ordinance.

FOWLER, J.:

We consider that this case is ruled by the decision in *Milwaukee v. Kassen*, 203 Wis. 383, (1931) 234 N. W. 352, which involved the same ordinance and substantially the same facts as to distribution. The ordinance is set out in full at p. 384 of the *Kassen Case*. In that case political handbills were being distributed in the same manner and with the same effect as here. In that case and a prior case it was held that "The object sought to be attained by the ordinance evidently is to prevent an unsightly, untidy and offensive condition of the sidewalks." *Mittleman v. Nash* [fol. 32] *Sales, Inc.*, 202 Wis. 577, 232 N. W. 527. All points here raised were raised in the *Kassen Case*, except such as are hereinafter discussed. We see no need to restate or add to what is said in that case upon the points there covered.

It is contended that the case of *Loyell v. City of Griffin*, 303 U. S. 444, 82 L. Ed. 660 (1938) overrides the *Kassen Case* and requires the reversal of the instant one. The ordinance involved in the *Griffin Case* was held to violate the Constitution of the United States in that it unduly restricted the rights of the citizen as to freedom of speech and press and in the free exercise of religion. No question of religion is here involved. The ordinances involved in the two cases are so widely different that we perceive no conflict between the decisions. The act involved in the *Griffin Case* was that the free distribution within the city of a tract or pamphlet "setting forth the gospel of the Kingdom of Jehovah," a religious cult of which the petitioner in certiorari was a member, without having first procured a license so to do as required by an ordinance of the city. The ordinance prohibited "the practice of distributing, either by hand or otherwise, or circulars, handbooks, advertising or literature of any kind, whether delivered free or sold, within the limits" of the city unless a license was first procured from the city manager. So doing was declared a nuisance. The ordinance was manifestly not aimed to prevent the littering of streets, as was the instant ordinance. The opinion in the *Lovell Case*, *supra*, written by Mr. Chief Justice Hughes negatives the idea that an ordinance aimed to prevent "the littering of the streets" is within the purview of the decision in that case. It is said p. 662:

"It (the ordinance) is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involve disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

The implication plainly is that an ordinance so aimed is not unconstitutional, if reasonable in its terms. The construction of the Milwaukee ordinance, as held by our state court, is binding upon the federal courts, so far as its aim or purpose is concerned. The purpose of the ordinance would not, of course, except it from operation of the freedom of speech, press and religion provisions of the United States Constitution, or from the operation of the XIVth [fol. 33] Amendment thereto if it were enforced in a discriminatory manner or in such a way as unreasonably to restrict the rights of the citizens thereunder. But the instant ordinance was found in the instant case not to

have been so enforced, and the trial court held and we consider correctly that the defendant's rights were not unreasonably restricted.

Unless and until delivery of the handbills was shown to result in a littering of the streets their distribution was not interfered with.

The only contention of the defendant here made, so far as we can discover, that was not made in the *Kassen Case*, supra, is that the distribution of the handbills was lawful under a statutory provision enacted since that case was decided, sec. 103.53 (1) (a) of the State Labor Code. This declares lawful "Giving publicity to and . . . communicating information regarding the existence of, or the facts involved in, any (labor) dispute, whether by advertising, speaking, patrolling any public street or any place where any persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof."

The distribution here involved did not do any of the things impliedly prohibited by this section in "communicating information," and the content of the handbill was such as to be within the meaning of "giving publicity" and "communicating information" thereby declared lawful. But properly construed this does not make lawful the doing of things that violate existing lawful statutes or ordinances. The things mentioned which the code provision cited expressly permits must be done without so doing. That provision was not intended and can not be construed to repeal or render void existing valid ordinances enacted to provide for the necessities or convenience of traffic in the city streets or their safety or seemly appearance, and it can not be construed so to operate.

By the Court:

The judgment of the circuit court is affirmed.

[fol. 34] STATE OF WISCONSIN,
Supreme Court:

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original printed

"case" filed August 19th, 1938, and the opinion of the Court filed January 10th, 1939, and now on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 31st day of January, A. D. 1939.

Arthur A. McLeod, Clerk of the Supreme Court of Wisconsin. (Seal Supreme Court of Wisconsin).

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted, and the case is assigned for argument immediately following No. 715.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2531)